# In the Supreme Court of the United States

OCTOBER TERM, 1968

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No. 873

ETHEL M. BEAL, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. 21-23) is not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on November 26, 1968 (Pet. 21). The petition for a writ of certiorari was filed on December 23, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

Whether petitioner was deprived of a fair trial because a bill of particulars was denied; because the net worth proof of income varied slightly from the figures stated in the indictment and specified prior to trial; because one juror denied knowing petitioner and was himself under tax investigation; because evidence received from a certified public accountant was not suppressed; because two Internal Revenue agents were allowed to be in the court room throughout the trial; because the value of assets was shown by reference to years antedating the indictment period; because of the use at trial of records turned over by petitioner to the revenue agents; because a revenue agent allegedly testified falsely; or because relevant evidence revealed that petitioner received income from prostitution.

## STATEMENT

Petitioner was indicted (R. 1)[1] in four counts for willful attempted evasion of income taxes, in violation of Section 7201 of the Internal Revenue Code of 1954, by the filing of false income tax returns for the years 1959 through 1962. The government's proof of income was by the net worth method and the jury found petitioner guilty on all four counts. Petitioner received a

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[1] "R." references are to the "Certified Record on Petition for Writ of Certiorari"; the page numbering of this record assigns a single number to each document, rather than to each page. "Tr." will be used to refer to the 3-Volume Transcript of Trial Proceedings, and "Supp. Tr." to refer to a "Supplemental Transcript" of proceedings on motion for new trial.

suspended two year sentence and a fine of $2,500 on each count and was placed on probation for two years. (R. 38.) The court of appeals affirmed *per curiam* (Pet. 21-23).

## ARGUMENT

Petitioner presents (Pet. 9-19) the same ten claims of error which she presented by brief in the court of appeals, where at oral argument her counsel "largely abandoned" (Pet. 22) all the grounds except three, which now constitute her points 4, 5, and 8 (Pet. 10-12, 14-15). None of the grounds advanced has any substance.

1. The granting of a bill of particulars is a matter resting largely in the discretion of the trial court, and a denial of particulars does not call for reversal unless the defendant can show surprise or prejudice. See *Wong Tai* v. *United States*, 273 U.S. 77; *Ross* v. *United States*, 374 F. 2d 97 (C.A. 8). Here, the indictment (R. 1) stated figures for petitioner's correct income and tax. The government, in compliance with the court's order (Tr. 85-86), notified petitioner's counsel before trial (R. 20) that proof of income would be by the net worth method and gave figures for petitioner's beginning net worth and for her estimated living expenses. Petitioner asserts that the denial of further particulars was to her "detriment" (Pet. 9), but fails to explain how she was either surprised or prejudiced. Thus, no ground for reversal appears.

2. By letter dated May 24, 1966, the United States Attorney advised petitioner's counsel that the government's figure for beginning net worth was $85,238.92

(R. 20). The evidence at trial, as reflected in the government's net worth computation (Govt. Ex. 81), showed a beginning net worth of $80,658.71. This variation is to be compared with the allegation and proof of over $50,000 of unreported income (R. 1; Govt. Ex. 81). Minor variations of this order are a commonplace in net worth cases and are not a ground for reversal. See *United States* v. *Costello*, 221 F. 2d 668 (C.A. 2), affirmed, 350 U.S. 359; *White* v. *United States*, 216 F. 2 1, 5 (C.A. 5); *Tinkoff* v. *United States*, 86 F. 2d 868, 878 (C.A. 7). Petitioner, similarly, asserts (Pet. 9) a variation between her living expenses as predicted and as proved, but the respective variations are inconsequential, being less than 5 percent in amount for each year (R. 20; Govt. Ex. 81).

3. Petitioner (Pet. 10) moved for acquittal because of variations between her taxable income as charged in the indictment (R. 1) and as proved at trial (Govt. Ex. 81). This claim of error is frivolous, since no surprise or prejudice could have resulted from the trifling variations involved. See *United States* v. *Costello*, *supra; United States* v. *Albanese*, 224 F. 2d 879, 882 (C.A. 2), certiorari denied, 350 U.S. 845.

4. Petitioner contends (Pet. 10-11) that she was denied a fair trial because a juror (James B. Ledford) denied, on *voir dire*, that he was acquainted with petitioner and her husband and because this juror was himself the subject of a tax examination. Petitioner raised these same questions before the district court on motion for new trial (Supp. Tr. 1-22). At the hearing on that motion, the juror testified that he knew

petitioner's husband as "Raymond" but did not know the husband's last name, that he was not acquainted with petitioner, and that the name "Beal" did not "register" when he was questioned prior to trial (Supp. Tr. 9-11). As for his own involvement in a tax examination, he revealed that fact on *voir dire* and stated that he would not be swayed one way or the other in consequence (Supp. Tr. 19-20). On the motion for new trial, the district court reminded petitioner's counsel that he could have challenged this juror for cause, but failed to do so, and concluded, in any event, that the juror had been impartial (Supp. Tr. 21-22).

5. Petitioner contends (Pet. 12) that the trial court should have suppressed evidence and documents obtained by Internal Revenue agents from a certified public accountant *before* March 23, 1964, because the accountant, who had prepared her tax returns, violated his confidential relationship with petitioner by permitting the agents to examine his files without obtaining her permission. However, petitioner concedes that the accountant could properly have disclosed his records without her permission *after* March 23, 1964, when an Internal Revenue summons for testimony and documents was served on him (Tr. 533). In any event, no constitutional rights of petitioner were violated merely because a certified public accountant permitted revenue agents to see *his* files, nor was there any breach of any common law privilege of confidentiality, since no such privilege attaches to disclosure to an accountant. See *Falsone* v. *United States*, 205 F. 2d 734 (C.A. 5), certiorari denied, 346 U.S. 864; *Col-*

*ton* v. *United States*, 306 F. 2d 633 (C.A. 2); *Gariepy* v. *United States*, 189 F. 2d 459 (C.A. 6); *Zimmermann* v. *Wilson*, 105 F. 2d 583 (C.A. 3); *Sale* v. *United States*, 228 F. 2d 682, 686 (C.A. 8); *Olender* v. *United States*, 210 F. 2d 795 (C.A. 9); cf. *Wilson* v. *United States*, 221 U.S. 361, 376-380; *United States* v. *White*, 322 U.S. 694, 698-699.

6. The trial judge granted the government's request that two Internal Revenue agents be permitted to remain in the court room during the trial, on the ground that both were needed in view of the voluminous exhibits involved (Tr. 1-4). The ruling was discretionary, and no resulting prejudice appears.

7. Petitioner contends (Pet. 13-14) that testimony concerning transactions which occurred long before the 4-year period covered by the indictment was improperly received. The testimony was, however, clearly relevant to the issues in the case. For example, Solly Hall testified that petitioner bought a house in 1945 for $15,750 (Tr. 302), and this figure appears in the government's net worth computation (Govt. Ex. 81) for this asset at the opening date, December 31, 1958. Similarly, W. B. Walker testified concerning additions and improvements to this real estate (Tr. 340-343).

8. Petitioner asserts (Pet. 14-15) that Agent Johnson was "lying" when he testified that petitioner's records were inadequate to show her correct income. The jury's verdict is a sufficient denial of this assertion. Petitioner also alleges (Pet. 15) that Agent Cook or Agent Johnson illegally seized her records. The district court, after hearing evidence on the point

(Tr. 379-400), found that petitioner voluntarily complied with a request to see her records (Tr. 406). The evidence clearly supported that finding.

9. Petitioner's contention (Pet. 16-18) that Agent Johnson must have prevaricated, because he first said that he prepared government Exhibit 81 (the net worth computation) and later that it was prepared under his supervision, is frivolous, as is the contention (Pet. 18) that it was invidious to prosecute only petitioner and not her husband.

10. Petitioner is mistaken in stating that a prostitute's testimony was introduced for the purpose of prejudicing the jury. The witness testified (Tr. 451-457) that in 1962 she and others worked as prostitutes at petitioner's hotel and shared their earnings with petitioner. Obviously it was relevant to show a likely source of unreported income, especially in response to petitioner's theory that all her income could be found in the records of her hotel business. See *Holland* v. *United States*, 348 U.S. 121, 137-138.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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